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IN THE

SUPREME COURT OF THE UNITED STATES

RODNEY SANFORD and ADAPT, INC.,
Petitioners,

versus

LEONARD O. GARDENOUR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May diversity jurisdiction ever be created in or conferred upon a United States District Court by operation of estoppel?

Subsidiary Question

If there is such a thing as diversity jurisdiction by estoppel, does it apply to a plaintiff whose only inequitable act is to seek more than the jurisdictional amount in federal court but only if he loses a motion to remand his case to state Court upon the proper basis that the jurisdictional amount has not been met?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS AND ORDERS BELOW	1
JURISDICTION OF THE COURT	2
CONSTITUTIONAL, STATUTORY PROVISIONS AND COURT RULES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	4
ARGUMENT	8
I. There is no such thing as Jurisdiction by Estoppel: such a concept violates every notion of the limited nature of federal Court jurisdiction and is an egregious abuse of power by the Federal judiciary that this Court must squelch.	8
II. Even if there were such a creature as Jurisdiction by estoppel, it obviously does not apply in this case.	10
CONCLUSION	11
APPENDIX	1a–32a
Opinion of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the District Court, filed July 17, 2000	1a
Order of the United States District Court for Western Kentucky, denying the Plaintiffs' Motion to remand this case to state Court, entered April 1, 1998	8a
Memorandum Opinion of the District Court granting Summary Judgment, entered December 22, 1998	9a

Table of Contents—continued

	PAGE
Order reflecting above Opinion and granting the Defendant 14 days to respond to Plaintiffs' Motion for Summary Judgment on Counterclaim, entered December 22, 1998	19a
Memorandum Opinion of the District Court denying Plaintiffs' motion to set aside or Vacate the Order of December 22, 1998, entered March 16, 1999	20a
Order reflecting above Opinion, dismissing the Defendant's Counterclaim, and making entire case final and appealable, entered March 16, 1999	23a
Order of the United States Court of Appeals denying Plaintiffs' Petition for Rehearing, filed August 25, 2000	24a
Plaintiff's Motion to Remand This Case to Jefferson Circuit Court, filed in United States District Court for Western Kentucky, March 18, 1998	25a
Proposed Order tendered with above Motion, March 18, 1998, not signed	27a
Letter of Defendant Leonard O. Gardenour to Judge Ken Corey of Jefferson Circuit Court, dated February 14, 1988	28a
"Special Supervision Report" by Defendant Leonard O. Gardenour concerning Derwin Taylor, dated February 4, 1997, attached to above letter when sent to Judge Corey	31a
Letter from Judge Ken Corey to Commissioner Douglas Sapp, dated February 27, 1997	32a

TABLE OF AUTHORITIES

	PAGE
Cases:	
American Fire and Casualty Co. v. *Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 705 (1951)	8
D'Agostino Excavators, Inc. v. *Heyward Robinson Co.*, 430 F.2d 1077 (1st Circ., 1970)	9
Mansfield C & L M R. Co. v. *Swan*, 111 U.S. 379, 45 S.Ct. 510, 38 L.Ed. 462	8
Palmer v. *Mores*, 44 F.Supp. 704 (D. Pa., 1942)..	9
St. Paul Mercury and Indemnity Co. v. *Red Cab Co.*, 303 U.S. 283 (1938)	10
Thomas v. *District of Columbia*, 82 F.R.D. 93 (D. D.C. 1979)	9
Statutes:	
28 United States Code Section 1332(a)	3, 5, 6
28 United States Code Section 1446(b)	3
28 United States Code Section 1447(c)	3, 5, 6
Constitutional Provisions:	
Constitution of the United States, Article IV, Section 1	2, 10
Rules of Procedure:	
Federal Rule of Civil Procedure 26(a)	7–8
Kentucky Rule of Civil Procedure 8.01(2)	3, 5

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OPINIONS AND ORDERS BELOW

The United States Court of Appeals entered an Order denying the Petitioner's Petition for Rehearing on August 25, 2000, No. 99-5504, which Order may be found in the Appendix of this Brief at page 24a.

The United States Court of Appeals filed its opinion in this case on July 17, 2000, No. 99-5504, which opinion may be found in the Appendix of this Brief at pages 1a-7a.

The United States District Court for Western Kentucky at Louisville entered an Order denying the Petitioner's FRCP 56 motion to vacate its earlier summary judgment on March 16, 2000, No. 3:98CV-501 which Order may be found in the Appendix of this Brief at page 23a. On the same day it entered a Memorandum Opinion in support of the Order denying the Motion to vacate, which may be found at pages 20a-22a of the Appendix of this Brief.

The United States District Court for Western Kentucky at Louisville entered an Order granting the Respondent's Motion for Summary Judgment on December 22, 1998, No. 3:98CV-501, which Order may be found at page 19a of the Appendix of this Brief. On the same day the Court entered a Memorandum Opinion in support of the Order granting Summary Judgment, which may be found at pages 9a-18a of the Appendix of the Brief.

None of the opinions of the Courts below were published in any official reporter.

JURISDICTION OF THE COURT

The Order sought to be reviewed was entered on July 17, 2000. Reconsideration was denied on August 25, 2000.

The jurisdiction of this Court is invoked under 28 United States Code section 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED IN THIS CASE

Constitution of the United States Article IV, Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

28 United States Code Section 1446(b) Paragraph 2

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 United States Code Section 1447(c)

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 United States Code Section 1332(a)(1)

The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between — citizens of different states.

Kentucky Rule of Civil Procedure 8.01(2)

(2) In any action for unliquidated damages the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court; provided, however,

that all parties shall have the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence. When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories; if this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories. (Amended October 18, 1977, effective January 1, 1978; amended June 29, 1984, effective January 1, 1985; amended June 30, 1986, effective January 1, 1987.)

STATEMENT OF THE CASE

This is a libel case. The Petitioners Rodney Sanford and ADAPT, Inc., sued the Respondent, Leonard O. Gardenour, a Kentucky Probation and Parole Officer, over several written communications that Gardenour had with two Judges of the Jefferson Circuit Court of the Commonwealth of Kentucky between February 14, 1997, and December 17, 1997, concerning the Petitioners, who were engaged in the business of providing voluntary and Court-ordered drug screens and tests and related services for individuals charged with or convicted of crimes in Jefferson County, Kentucky.

Since the question now before this Court does not involve the merits of the Petitioners' claims, the Petitioner will only say this upon that subject: the opinions of the lower Courts are egregiously wrong upon both the law and the facts.

In order to give the Court the "flavor" of Petitioners' claims, the Petitioners have appended the following documents relating to them: 1) a letter, on plain paper, from Respondent to Jefferson Circuit Judge Ken Corey dated February 14, 1997 (Appendix for the Sixth Circuit, pp. 88-89); 2) A "Special Supervision Report" referenced in the letter of February 14, 1997 and dated February 4, 1997,

and 3) a letter from Judge Ken Corey to Gardenour's superiors in response to the letter of February 14, 1997, dated February 27, 1997 (Appendix for the Sixth Circuit, pp. 87a, 90-91). These documents, which appear in the Appendix to this Brief at pages 28a-33a, clearly illustrate: 1) the rogue and unofficial nature of Gardenour's contacts with Judge Corey; 2) the unauthorized nature of these contacts; and 3) the viciously defamatory nature of Gardenour's communications, and their unprivileged character.

As stated above, it is not the substantive rulings of the Courts below that the Petitioner is challenging. Rather, it is their jurisdiction to have heard and decided this case.

The Respondent removed this case from state to federal Court solely upon the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332(a), as Respondent was at the time of removal a citizen of the State of Indiana and the Petitioners were citizens of the Commonwealth of Kentucky. At the time of removal, the Plaintiff's complaint, and the record of the case, was absolutely silent upon the issue of the amount in controversy between the parties. This was because Kentucky Rule of Civil Procedure 8.01(2) prohibits the articulation of any sum certain as unliquidated damages.

The Respondent made no effort whatsoever to ascertain the amount sought by the Petitioners, as permitted by Kentucky Rules, before filing his Removal Petition.

On March 18, 1998, the Petitioners sought to have this case remanded back to state Court, upon the basis that they were seeking less than the jurisdictional amount of $75,000, exclusive of interest and costs (Appendix for the Sixth Circuit pp. 24-25; Appendix to this Brief, pp. 25a-26a). The Petitioners, of course, invoked 28 U.S.C. §1447(c) in support of their motion *(Id.)*.

The Petitioners also, pursuant to local rule, tendered a proposed Order of Remand for the signature of the District Judge. The proposed Order recited that:

> Motion having been made, and it appearing to the Court that the amount in controversy relating to the Plaintiff's claim against the Defendant is below the amount necessary to confer jurisdiction over this Court pursuant to 28 U.S.C. §1332(a)(1), it is hereby ORDERED pursuant to 28 U.S.C. §1447(c) that this case be and is hereby REMANDED to the Jefferson Circuit Court, Division 1, of the Commonwealth of Kentucky (Appendix for the Sixth Circuit, p. 26; Appendix to this Brief, p. 27a).

The District Court denied the Motion to remand on March 31,1998, upon the sole basis that the Defendant had filed a counterclaim against the Plaintiffs. The Court opined that, ". . . amounts sought by counterclaim are in controversy for purposes of determining jurisdiction," (Appendix for the Sixth Circuit, p. 60; Appendix to this Brief, p. 8a).

On that same day, the petitioners filed their FRCP 26(a) disclosures with the Court. In it, they stated that:

> . . . for jurisdictional purposes and their motion to remand this action to state court, the total amount of damages sought, exclusive of costs, is $74,900. [but . . . should the case continue in this Court, they [the Plaintiffs] would seek over $500,000 in damages (Appendix for the Sixth Circuit, p. 33; quoted in Opinion of the Sixth Circuit, pp. 3-4; Appendix to this Brief, p. 3a).

The case proceeded. The parties vigorously contested Petitioners' claims, briefing and re-briefing the issues they raised. The Counterclaim, on the other hand, was subject only to the Petitioners' motion to dismiss, which was finally granted at the end of the litigation in the District Court after the District Court had given the Respondent

multiple opportunities to say something, anything, in support of it, all of which opportunities the Respondent declined (District Court Order of December 22, 1998; Appendix for the Sixth Circuit, p. 71; Appendix for this Brief, p. 19a; District Court Memorandum Opinion of March 16, 1999; Order of March 16, 1999; Appendix for the Sixth Circuit, pp. 73-75; Appendix to this Brief, pp. 21a-23a).

The District Court granted Respondent's Motion for Summary Judgment on December 22, 1998 and denied the Petitioners' Motion to Set Aside this Judgment pursuant to FRCP 56 on March 16, 1999 by means of the opinions and Orders referenced immediately above.

The Plaintiffs then appealed to the United States Court of Appeals for the Sixth Circuit.

The centerpiece of this appeal was Petitioners' attack upon the jurisdiction of the District Court Basically, the Petitioners argued that there are either no circumstances under which a Counterclaim should be included in determining if the jurisdictional amount has been met or, in this case, the Counterclaim should not be considered because it was obviously frivolous (an allegation that the Petitioners' lawsuit was an "abuse of process").

The Court of Appeals agreed with the Petitioners on this issue, holding that counterclaims basically are not to be considered in determining the jurisdictional amount (Opinion of the Court of Appeals, p. 5; Appendix to this Brief, pp. 4a-5a).

However, the Court of Appeals refused to hold that the District Court had no jurisdiction over Petitioners' lawsuit. Instead, it held that:

> . . . the plaintiffs are estopped from arguing their case is worth less than $75,000 by their Rule 26 disclosures. Unlike the plaintiffs in *Adkins, Oder,* or *Cole*, Sanford and ADAPT made no binding stipulation in their motion for remand that they would not seek or enforce a

judgment in state court of less than $75,000. In fact, in their Rule 26 disclosures, they sought in excess of $500,000 in actual and punitive damages in federal court. Thus by their own admission, their claim is worth more than the minimum jurisdictional amount. It is obvious from the disclosures that the plaintiffs intended to seek well over the jurisdictional amount in damages. Therefore, the district court did not err in concluding it had jurisdiction over this case (Opinion of the Court of Appeals, pp. 5-6; Appendix, this Brief, p. 5a).

Petitioners vigorously contested this analysis in a Petition for Rehearing to the entire Court of Appeals, as well as to the original hearing panel. On August 25, 2000, the Court rejected this Petition (Appendix to this Brief, pp. 20a-23a).

Petitioners' arguments against the holding of the Court of Appeals, which included arguments that the parties themselves had never advanced, were basically similar to those that the Petitioners are making in this pleading.

ARGUMENT

I. There Is No Such Thing as Jurisdiction by Estoppel: Such a Concept Violates Every Notion of the Limited Nature of Federal Court Jurisdiction and Is An Egregious Abuse of Power by the Federal Judiciary That This Court Must Squelch.

This Court has explicitly and unequivocally held that no federal Court may obtain jurisdiction over any cause by exercise of equitable doctrines such as estoppel, *American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 71 S.Ct. 534, 542, 95 L.Ed. 705 (1951), citing *Mansfield C & L M R. Co.* v. *Swan*, 111 U.S. 379, 383, 45 S.Ct. 510, 512, 28 L.Ed. 462.

Petitioner concedes that this may appear to be a harsh and unfair rule of law. The most common example where

this is the case is where a civil defendant wrongfully removes a case to federal court, after which the plaintiff unsuccessfully seeks remand, obtains a judgment against the defendant, and the defendant argues against federal jurisdiction on appeal, DESPITE THE FACT THAT IT WAS HE WHO ORIGINALLY INVOKED IT, *Thomas* v. *District of Columbia*, 82 F.R.D. 93 (D. D.C., 1979), *United States for Use and Benefit of D'Agostino Excavators, Inc.* v. *Heyward Robinson Co.*, 430 F.2d 1077 (1st Circ., 1970), *cert. denied*, 400 U.S. 1021, 91 S.Ct. 582, 27 L.Ed.2d 632 (1970). The rule against estoppel is so strict that it applies even if the defendant attacking jurisdiction has admitted that the amount sought by the plaintiff served to meet the jurisdictional requirement, *Palmer* v. *Mores*, 44 F.Supp. 704 (D. Pa., 1942).

Basically, what has happened in this case is that the Court of Appeals has sanctioned the District Court's "accepting" jurisdiction over a case that it had no business hearing. There are simply no limits to the jurisdiction of federal Courts if this Court is willing to accept the notion of jurisdiction by agreement, or jurisdiction by assent of the District Judge: divorces, child custody battles, fence line disputes. Of course, few judges exhibit the poor judgment or tendency to self-aggrandizement that such a situation would evidence, but one is too many.

Clearly, the Courts below have decided this issue, an important federal question if ever there were one, in a way that conflicts with relevant decisions of this Court. In addition, they have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Both Rules 10(a) and 10(c) of this Court, therefore, support the granting of this petition.

II. Even If There Were Such a Creature as Jurisdiction by Estoppel, It Obviously Does Not Apply in This Case.

The law is clear that the instrinsic "value" of a claim or cause of action, even the value assigned to it by the Plaintiff, makes no difference in determining federal jurisdiction if, as in this case, the plaintiff agrees to sue for less as a means of keeping his case out of federal Court. This Court said as much in the case of *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938), when it opined that a plaintiff who:

> . . . does not desire to try his case in the federal court . . . may resort to the expedient of suing for less than the jurisdictional amount, and though he may be justly entitled to more, the defendant may not remove [the case to federal Court].

Clearly, the Court of Appeals violated the Petitioners' right to use this expedient. It does not matter if the case at bar is worth $1 or $1,000,000, if Petitioners say it is worth $75,000 for purposes of defeating removal jurisdiction, the Courts of this land must take their word for it because that is the law of the land.

Petitioners admit, of course, that if their case were going to remain in federal Court, they were going to seek more than the jurisdictional amount. At that time they had notified the Court of their desire to remand the case and had tendered an Order which, if signed in the form tendered or a similar form, would have been entitled to the full faith and credit of all judicial Orders under Article IV, Section 1 of the Constitution of the United States, i.e. there would have been no way whatsoever that the Petitioner could have sought more than $75,000 in state Court after remand.

Petitioners do not know how a "stipulation" or some other document could have estopped them any more effectively from attempting to renege on their representation of

the cases's value for purposes of defeating federal jurisdiction than their proposed tendered Order of Remand.

Back to federal Court. Do civil defendants who believe a plaintiff has wrongfully invoked federal jurisdiction have to insist that the Court adhere to state procedural rules lest they be estopped from challenging jurisdiction on appeal (in Kentucky, 9 of 12 jurors may make a verdict; in federal Court all verdicts are unanimous; in Kentucky summary judgement is rarely granted; in federal Court it is frequently granted)? Of course not. Nor should these Petitioners have been precluded from seeking more than the jurisdictional amount in the event that the District Court not did not remand their case to state Court. It seems quite apparent that a litigant may justly use all of the tools of whatever forum he finds himself in, including the capability to seek more money in damages than he would be entitled to seek in some other Court.

Even if, therefore, equitable principles may be relevant to determining federal Court jurisdiction, such principles were wrongly applied in this case. Petitioners violated no equitable principles whatsoever.

CONCLUSION

The actions of the Courts below, especially the Court of Appeals, were so arbitrary as to be whimsical and ridiculous. First it invented for the occasion a "legal principle" that violates every known canon of the law of federal jurisdiction, then it wrongfully applied the "principle," and finally it refused to admit that its actions were completely wrong when confronted with the well-established law on the subject.

Petitioners can imagine few circumstances that justify the relief sought in this pleading more forcefully than those they have described in it.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 99-5504

RODNEY SANFORD and
ADAPT, INC., - - - - - *Plaintiffs-Appellants,*

v.

LEONARD O. GARDENOUR, - - *Defendant-Appellee.*

On Appeal from the United States District Court
for the Western District of Kentucky

JUDGMENT—Filed July 17, 2000

Before: KENNEDY, SILER, and BATCHELDER, Circuit Judges.

SILER, Circuit Judge. Plaintiffs Rodney Sanford and ADAPT, Inc., appeal the district court's grant of summary judgment to defendant Leonard 0. Gardenour in this diversity libel action. They argue that the district court erred by: (1) failing to remand for lack of jurisdiction; (2) finding that Gardenour had sovereign immunity; (3) finding that Gardenour was entitled to an absolute privilege for his communications with the judges; and (4) finding that Gardenour would also be entitled to qualified immunity. We AFFIRM.

BACKGROUND

Sanford is a former Kentucky probation and parole officer who worked in the Louisville, Kentucky office until he retired in 1993. In 1995, he created ADAPT, a private drug testing corporation which provides drug testing and screening services to Kentucky courts and related agencies

of Kentucky state government. Sanford is the corporation's only officer and permanent employee. Gardenour is a state probation officer at the Louisville office.

In early 1997, Gardenour delivered to Louisville circuit court judges documents expressing his concerns about perceived security lapses in ADAPT's drug testing procedures. The first document in issue, dated January 8, 1997, was not sent to the judges but was attached to Gardenour's motion for summary judgment. In this document, a special supervision report concerning a probationer, Gardenour stated his suspicions of ADAPT's procedures and results and requested that the probationer be drug-tested in the probation office. Gardenour's supervisor refused to approve the report and consequently, the space provided on the report for a supervisor's approval and signature is blank.

The second and third documents in issue are a supervision report attached to a letter dated February 14, 1997, addressed to Jefferson Circuit Court Judge Ken G. Corey. In that letter, Gardenour requested a waiver of the court's order that the probationer be drug-tested at ADAPT. Gardenour explained that Sanford was a friend of supervisors who rewarded officers who used ADAPT's services and punished those who did not. In addition, Gardenour indicated that some of ADAPT's urinalyses indicated negative results when his and other probation officers' tests indicated positive. Although he did not revise his order, Judge Corey wrote Commissioner Douglas Sapp that Gardenour's allegations were "very troubling" and that he found himself "in a quandary as to future referrals."

The fourth document is a letter dated December 17, 1997, addressed to Judge Thomas B. Wine. In that letter, Gardenour also asked the court to revise its order requiring the probationer to be tested at ADAPT. Additionally, Gardenour complained that when he questioned the probationer about Sanford's "program," the probationer informed him that Sanford had directed him to refuse to answer any questions about the program. On December 30, 1997, Wine responded that he did not believe ADAPT was sabotaging Gardenour's efforts at drug-testing.

Sanford and ADAPT filed their complaint in a Kentucky state court against Gardenour in 1998. They alleged that Gardenour's reports and letters libeled them, caused them to lose profits, and caused emotional distress. In accordance with Ky. Civ. R. 8.01(2), they did not recite a specific sum in their prayer for damages. However, they did ask to be compensated "to the fullest extent possible" and that they "ought to recover substantial punitive damages. "

Gardenour timely removed the case to federal court pursuant to 28 U. S. C. § 1441 *et seq.* His petition merely states, "based upon the allegations in the Complaint, the amount in controversy exceeds $75,000 in damages, exclusive of interest and costs. " The following day, Gardenour filed a counterclaim for abuse of process.

On March 18, 1998, Sanford and ADAPT moved to remand. In the motion counsel stated that plaintiffs were seeking damages of" less than $75,000, exclusive of interests and costs. " The district court denied the motion to remand on March 31, 1998, and this order was entered on April 1, 1998. The court, citing *Swallow & Associates* v. *Henry Molded Products, Inc.,* 794 F. Supp. 660 (E. D. Mich. 1992), held that "amounts sought by counterclaim are in controversy for purposes of determining jurisdiction. "

However, on March 31, 1998, the day the court denied the motion to remand, the plaintiffs filed Fed. R. Civ. P. Rule 26 disclosures, in compliance with a court order. The plaintiffs stated, "[f]or jurisdictional purposes and their motion to remand this action to state court, the total amount of damages sought, exclusive of costs, is $74,999. " But, "should the case continue in this Court," they would seek over $500,000 in damages.

The district court later granted Gardenour's motion for summary judgment. It determined that, under Kentucky law, Gardenour was entitled to sovereign immunity because his communications with the judges were within the scope of his duty as a probation officer. It also held that the communications at issue were absolutely privileged be-

cause they were part of judicial proceedings. Finally, the court commented that although it did not need to reach the issue of qualified immunity, it did not find any evidence of "ill will, hatred, or wrongful motive" sufficient to overcome the qualified immunity defense under Kentucky law.

DISCUSSION

This court reviews the existence of subject matter jurisdiction as a question of law *de novo*. *See Gafford* v. *General Elec. Co.*, 997 F. 3d 150, 155 (6th Cir. 1993). The district court's factual determinations regarding jurisdictional issues, however, are reviewed for clear error. *Id.* Additionally, this court reviews the denial of a motion to remand de novo as well. *See Ahearn* v. *Charter Township of Bloomfield*, 100 F. 3d 451, 453 (6th Cir. 1996).

Gardenour's petition for removal asserted federal subject matter jurisdiction on the basis of diversity of citizenship and satisfaction of the amount in controversy requirement. It is undisputed that diversity of citizenship existed; thus, this court must determine whether the amount in controversy was met. Sanford and ADAPT argue that they stipulated after removal that the amount they were seeking was less than $75,000, and therefore the district court should have remanded the case pursuant to 28 U. S. C. § 1447(c). They rely on *Adkins* v. *Gibson*, 906 F. Supp. 345 (S.D. W. Va.. 1995); and *Oder* v. *Buckeye State Mut. Ins.*, 817 F. Supp. 1413 (S. D. Ind. 1992), for the proposition that, in a state that forbids pleading unliquidated damages in state court pleadings, the plaintiff may put the court on notice that she seeks less than the jurisdictional amount by making a statement to that effect in her motion to remand.

In this circuit, the determination of the appropriateness of federal jurisdiction in a diversity case is made at the time of removal. *See Ahearn*, 100 F. 3d at 453. We affirm the district court's determination that it had jurisdiction over the case, although we do so for different rea-

sons. The district court included the valuation of the counterclaim in assessing whether the amount in controversy exceeded the statutory requirements, relying on *Swallow & Associates,* 794 F. Supp. at 663. However, as plaintiffs point out, there is a split of authority as to whether a defendant who possesses a compulsory counterclaim which satisfies the federal jurisdictional requirements may aggregate the value of his claim with the value of the plaintiff's claims to satisfy the amount in controversy for removal purposes. Moreover, "the traditional rule has been that no part of the required jurisdictional amount can be met by considering a defendant's counterclaim" to satisfy the amount in controversy requirement for removal jurisdiction purposes. Wright & Miller, 14C Fed. Prac. & Proc. Juris. 3d 3725 (1998). Finally, "concern about encroaching on a state court's right to decide cases properly before it, requires [federal courts] to construe removal jurisdiction narrowly. " *Cole* v. *Great Atlantic & Pacific Tea Co.,* 728 F. Supp. 1305, 1307 (E. D. Ky. 1990) (remand ordered where plaintiff stipulated her unliquidated damages would not exceed $40,000. 00).

We hold that the plaintiffs are estopped from arguing their case is worth less than $75,000 by their Rule 26 disclosures. Unlike the plaintiffs in *Adkins, Oder, or Cole,* Sanford and ADAPT made no binding stipulation in their motion for remand that they would not seek or enforce a judgment in state court of less than $75,000. In fact, in their Rule 26 disclosures, they sought in excess of $500,000 in actual and punitive damages in federal court. Thus, by their own admission, their claim is worth more than the minimum jurisdictional amount. It is obvious from the disclosures that the plaintiffs intended to seek well over the jurisdictional amount in damages. Therefore, the district court did not err in concluding it had jurisdiction over this case.

This court reviews the district court's grant of summary judgment *de novo. See Monette* v. *Electronic Data Systems Corp.,* 90 F. 3d 1173, 1176 (6th Cir. 1996). Sum-

mary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

The district court correctly determined that Gardenour enjoys sovereign immunity concerning these reports because there was no evidence that he was acting outside the scope of his authority since there was no evidence of the existence of a policy specifically prohibiting Gardenour from communicating with judges without supervisory approval. Thus, the district court correctly granted summary judgment to Gardenour.

Plaintiffs also argue that the district court improperly granted summary judgment to Gardenour on his claim of privilege because Gardenour's reports were published to persons outside the scope of the privilege under Kentucky Revised Statutes § 439.510. Additionally, they claim that Gardenour's complaints made no sense, because Gardenour was free to administer drug tests to any probationer for any reason and at any time. Ultimately, plaintiffs argue that "there was no reason whatsoever for Gardenour to write to Corey about [a probationer being tested by] ADAPT except for Gardenour to malign the plaintiffs."

Citing this court's decision in *General Electric Co.* v. *Sargent & Lundy,* 916 F. 2d 1119, 1126 (6th Cir. 1990), the district court stated that "Kentucky courts have long recognized that statements in judicial proceedings, if relevant to the issues involved, are absolutely privileged, even though it may be claimed that they are false and alleged with malice." Thus, the court correctly found that Gardenour's statements were absolutely privileged.

As Gardenour points out, the district court found that there was no evidence of "ill will, hatred, or wrongful motive," which would defeat Gardenour's qualified privilege to communicate with the Jefferson Circuit Court. Plaintiffs, however, argue that "the entire tenor of Gardenour's writings about the Plaintiffs evidences his deeply felt animus toward them." This argument is without merit. Even if this court were to find that Gardenour's communications

were not absolutely privileged, plaintiffs have presented no evidence that the reports were maliciously uttered.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 98-CV-50J

RODNEY SANFORD and
ADAPT, INC. - - - - - - - - - - *Plaintiffs*

v.

LEONARD O. GARDENOUR - - - - *Defendant*

ORDER—Entered April 1, 1998

Motion having been made to remand this action to Jefferson Circuit Court, based solely on the allegation that the amount in controversy is inadequate to confer jurisdiction in this Court pursuant to 28 U. S. C § 1332(a)(1), and the Court finding that the amounts sought by counterclaim are in controversy for purposes of determining jurisdiction, see *Swallow & Associates* v. *Henry Molded Products. Inc.*, 794 F. Sup. 660 (E. D. Michigan 1992), and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the Motion to Remand be, and it is hereby, denied.

Date: March 31, 1998

Entered: April 1, 1998

/s/ [illegible]
Judge, U.S. District Court

cc: Mr. Leonard Gardenour
503 Captain Frank Road
New Albany, IN 47150

Hon. Bill Pettus
Office of Attorney General
700 Capitol Avenue
Capitol Building
Suite 18
Frankfort, KY 40601

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Case No. 3:98CV-50J

RODNEY SANFORD and
ADAPT, INC. - - - - - - - - - - *Plaintiffs,*

v.

LEONARD GARDENOUR - - - - - - *Defendant.*

MEMORANDUM OPINION—Entered December 22, 1998

This matter is before the Court on Defendant's Motion for Summary Judgment [Dkt. #20], and Plaintiffs' response [Dkt. #24] thereto. For the reasons that follow, Defendant's Motion is granted and Plaintiffs' claims are dismissed.

I. BACKGROUND

This case arises over four allegedly "libelous per se" documents, three of which Defendant, a probation officer in Louisville, wrote and either hand-delivered or mailed to Louisville circuit court judges. The complaint states that these documents falsely and maliciously imputed that Plaintiff Sanford and his drug testing/screening corporation ADAPT, INC. were incompetent in fulfilling their obligations to the courts.

The first document in issue was a supervision report dated January 8, 1997. In this report, Defendant stated that the probationer "submitted to a[n] urinalysis . . . which revealed the presence of marijuana. . . . [and that] [i]t should be noted that this urinalysis was monitored by a female officer, unlike the numerous urinalyses conducted by Adapt, Inc. (all of which were negative)." Defendant placed this report inside the probationer's case file and did not send it to any person outside the probation department.

The second and third documents consist of a supervision report dated February 5, 1997 which was attached to a two-page letter written to Judge Ken Corey. In the report, Defendant "request[ed] a waiver of the Court's Order of Shock Probation which require[d] [the probationer] to be drug-tested at Adapt, Inc. . . . [because] [c]ertain serious ethical questions have arisen regarding Adapt, Inc. In addition, the integrity of Adapt's procedures in collecting urine samples has been seriously compromised in the past. " In the attached letter, Defendant proceeded to explain the "serious ethical questions" to which he referred in his supervision report. Specifically, that some department supervisors were close friends with Plaintiff Sanford, who used to be a probation officer, and that "subtle coercion" had been undertaken at the probation department to encourage probation officers to use Adapt's services. In addition, Defendant indicated that some of Adapt's urinalyses indicated negative results when his, and other probation officers' indicated positive. Defendant proceeded to specify other instances of concern and concluded his letter by stating, "I believe the Court has been mislead regarding Adapt, Inc. I believe that officers have been improperly influenced by supervisors to use Adapt. I believe supervisors continue to suppress evidence of Adapt's unethical and improper conduct. I respectfully urge you to reconsider singling out Adapt as the urinalysis provider, in light of the above mentioned issues." Both the report and letter were hand delivered to Judge Corey. A copy of the report, but not a copy of the letter, was placed in the probationer's case file kept by the probation department.

The fourth document, a letter addressed to Judge Thomas Wine also "request[ed] a revision of [his] court order of probation which require[d] [the probationer] to be tested for alcohol, via urinalysis, at Adapt, Inc." In addition, Defendant indicated in the letter that when he asked the probationer about his "program," the probationer informed him that Plaintiff Rodney Sanford "had instructed him not to discuss any aspect of the 'program' with [his probation officer]." Defendant indicated in his letter that he took

"great exception to any private vendor sabotaging [his] authority and [his] sworn duty to supervise a client [and that] [he] was not aware of any other private vendor who gives license to convicted felons to defy their probation and parole officer." [See Dkt. #1, Exh. A,B,C,D]. The letter was mailed directly to Judge Wine and a copy was placed in the probationer's case file kept by the probation department.

Judge Corey, "finding himself in a quandary as to future referrals," wrote a letter to the Commissioner of the Department of Corrections indicating that the allegations were "very troubling" to him. [See Dkt. #24, Exh. C]. Judge Corey attached a copy of Defendant's letter in his correspondence to the commissioner and proceeded to "cc" the attorney general's office as well as all parties involved, including Plaintiff Sanford. [See id.].

This "alleged defamation" matter is now before the Court on Defendant's Motion for Summary Judgment and his claims of various types of privilege and immunity due to his position as a probation officer.

II. STANDARD FOR SUMMARY JUDGMENT

A motion for summary judgment is only granted when" . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of showing that there are no genuine issues of material fact is on the moving party. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 256 (1986). The court construes the evidence and draws all reasonable inferences in the light most favorable to the non-moving party. *See White* v. *Turfway Park Racing Ass'n., Inc.*, 909 F. 2d 941, 943-44 (6th Cir. 1990). When reviewing a motion for summary judgment, the court "must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Patton* v. *Bearden*, 8 F. 3d 343, 346 (6th Cir. 1993) (citations omitted).

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. *Sovereign Immunity / Quasi-Judicial Immunity Claims*

Traditionally, when determining if a state employee was entitled to sovereign immunity, the court had to first determine whether the employee was exercising a discretionary or a ministerial function. The important difference being that there was no liability for negligently exercising a discretionary function, whereas, there could be liability for negligently exercising ministerial functions. *See, e.g., Upchurch* v. *Clinton Co.*, 330 S. W. 2d 428, 431 (Ky. 1959). However, "[i]n 1986, the [Kentucky] legislature extended sovereign immunity to state officers and employees acting within the scope of their duties" whether discretionary or ministerial. *See Franklin Co.* v. *Malone*, 957 S. W.2d 195, 202 (Ky. 1997); *see also* Kentucky Revised Statutes, § 44. 073(13). The only limitation on this immunity blanket was that sovereign immunity could not be extended to "state officers or employees who engage[d] in activities outside the traditional role of government." *Malone*, 957 S. W. 2d at 202. Thus, "as long as the . . . officer acts within the scope of the authority of office, the actions are those of the government and the officer is entitled to the same immunity . . . ." *Id.*

The activities of a probation officer would be within the traditional role of government, and this conclusion is not disputed. What is disputed though, is whether the Defendant was acting "within the scope of the authority of office" when he wrote the "allegedly libelous" statements. This determination is critical because if the Defendant was acting within the authority of his office, then he is entitled to sovereign immunity, whereas, if he was not acting within the authority of his office, the Defendant will be liable in damages for any "libelous" statements he may have made.

Plaintiffs assert that the Defendant did not act within the scope of his authority because all reports and communications between his office and circuit judges are supposed to be approved by department supervisors. Since the Defendant admitted that his supervision reports and com-

munications were not approved by his supervisors, Plaintiffs contend the Defendant's actions were not the actions of the government and therefore, not entitled to sovereign immunity. [See Dkt. #24, p. 18]. As support for this assertion, Plaintiff Sanford includes his sworn affidavit. [See Dkt. #24, Exh. K]. There, Plaintiff Sanford states that he was a district supervisor in the Louisville probation department for nine years and during his tenure, "it was the policy and procedure of the office that Probation and Parole Officers had official communications with Judges about their probationers and parolees only with the approval of their supervisors." [See id.]. In addition, Plaintiff Sanford states that since his retirement from that position, he has "discussed the policy and procedure regarding communications between Probation and Parole officers and Judges with supervisors . . . [and] [t]hey have uniformly indicated to [him] that this policy . . . has not changed since [he] retired from the office. " [See id.].

In response to this allegation, defense counsel has submitted Defendant's sworn affidavit which states that there were no policies which prohibited probation officers from communicating directly in writing with judges without obtaining a supervisor's approval. [See Dkt. 25, Exh. 2]. In addition, defense counsel submits the sworn affidavit of C. L. Watts, the Director of the Division of Probation and Parole. [See Dkt. 25, Exh. 1]. Mr. Watts's affidavit supports the Defendant's in that it states there were no policies in 1997 which would have required a probation officer to first submit written correspondence to his supervisor before sending it to a judicial officer. [See id.].

In an attempt to summarize this dispute, Plaintiff Sanford states in his supplemental response that, "he has testified that it is his understanding, as a former 'District Supervisor' in the Louisville Probation and Parole Office, that Gardenour needed the approval of his supervisors to publish documents such as those at issue in this case to Circuit Judges . . . [and that he] believed that the individual with the most believable answer to the questions at hand would corroborate his position on this issue," so he took James Hager's deposition. [See Dkt. #40]. Plaintiffs

then proceeded to quote Mr. Hager, a department branch manager, as stating that ". . . all of the correspondence that comes out of this office should be subject to review by a supervisor," and that "[e]xcept for emergencies. . Probation and Parole Officer such as Mr. Gardenour are not supposed to 'by-pass' their supervisors when formally communicating with Circuit Judges. " [See Dkt. #40, p. 3]. As such, Plaintiffs conclude that Mr. Hager's testimony "clearly supports" their position that the Defendant was acting outside his scope of authority when sending correspondence to the circuit judges. [See id.]

However, a review of the record indicates that when cross-examined by defense counsel, Mr. Hager admitted that "[i]n reviewing what the policy — the wording of the policy literally, it does not conflict with what [Mr. Watts] said. " [See Hager deposition, p. 183]. There is no evidence in the record, and certainly not a copy of any policy, which specifically prohibits probation officers from communicating with circuit judges without supervisory approval. Plaintiff Sanford stated that "it is *his understanding,* as a *former* 'District Supervisor' in the Louisville Probation and Parole Office, that Gardenour needed the approval of his supervisors to publish documents such as those at issue in this case to Circuit Judges" [See Dkt. #40 (emphasis added)]. However, without proof of the existence of such a policy, this uncorroborated *belief* is not enough.[1] Absent the existence of such a policy specifically prohibiting Defendant from communicating with circuit judges without supervisory approval, it cannot be shown that the Defendant was acting outside the scope of his authority of office. Therefore, the Court finds that as a state employee acting within

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[1] Plaintiffs submitted highlighted copies of policy 27-15-01 and 27-12-04. However, when specifically asked about what policy 27-15-01 required, Mr. Hager, the department branch manager stated, "In terms of the affidavit C. L. Watts submitted, lie is correct, there is nothing in this wording that says it has to be reviewed before it goes to court because it doesn't word it that way." [See Hager deposition, p. 184-85]. And, a review of policy 27-12-04 indicates there is nothing in the wording of that policy which expressly calls for supervisory approval.

the scope of his authority of office as a probation officer, the Defendant is entitled to sovereign immunity.[2]

B. *Absolute Privilege / Qualified Privilege Claims*

Although the Court has already determined that the Defendant is entitled to sovereign immunity and dismissal from suit, the Court will nevertheless address Defendant's claims of privilege.

The Sixth Circuit opined that "Kentucky courts have long recognized that statements in judicial proceedings, if relevant to the issues involved, are absolutely privileged, even though it may be claimed that they are false and alleged with malice." *General Electric Co.* v. *Sargent & Lundy*, 916 F. 2d 1119, 1126 (6th Cir. 1990). To determine whether the privilege applies in a defamation case, the court must conduct a two-part analysis. Id. at 1127. "First, the occasion of the communication must be examined to determine if the statement was made 'preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding.' " *Id.* (citations omitted). "Second, a court must evaluate the content of the statement to determine if it 'has some relation to a proceeding that is contemplated in good faith and under serious consideration.' " *Id.* (citations omitted). And, since absolute privilege is an affirmative defense, the burden is on the defendant to prove that it applies. *Id.* at 1130.

In his attempt to prove his affirmative defense of absolute privilege, the Defendant states that "the communications were made . . . to Jefferson Circuit Court or a presiding circuit court judge in the context of the monitoring of persons ordered by the court to serve a probationary period. . . . [and] were made . . . 'in discharge of a duty under express authority of law . . . [and were] pertinent to the inquiry under investigation at the time.' " [See Dkt. 20, p. 12]. Defendant then cites Kentucky Revised Statutes § 439. 510 as providing:

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[2] As the Court has addressed the Defendant's claim of sovereign immunity and found it applicable in this case, it is not necessary to address Defendant's claim of quasi-judicial immunity.

> All information obtained in the discharge of official duty by any probation or parole officer shall be privileged and shall not be received as evidence in any court. Such information shall not be disclosed directly or indirectly to any person other than the court, board, cabinet, or others entitled under KRS 439.250 to 439.560 to receive such information, unless otherwise ordered by such court, board or cabinet. . . .

Hence, Defendant argues this statute contemplates that the four documents at issue here should remain privileged as they "contain information obtained by [the Defendant] in the discharge of his official duty in his capacity as a probation and parole officer and delivered to the Jefferson Circuit Court or a judge of the Jefferson Circuit Court." [See Dkt. #20, p. 12].

Plaintiffs contend that these documents were not prepared in "the discharge of his official duty" because as a probation officer, the Defendant can only officially communicate with judges in ways approved by his supervisors. [See Dkt. #24]. And, since none of Defendant's communications were approved by his supervisors, they should not be entitled to an absolute privilege. [See id.] In addition, Plaintiffs contend that Kentucky Revised Statutes § 439. 510 specifically states that the information should not be disclosed and since Judge Corey disclosed the documents to others, he obviously did not feel that the documents fell into the privileged and confidential status set forth in the statute. [See id.]. Specifically, Plaintiffs state "this Court need not rely upon the arguments of counsel to reach the proper conclusion. It may, instead, examine the actions of the judges involved in this controversy. . . ." [See id. at p. 23].

However, with all due respect to Plaintiffs, this Court will not consider the subjective intent of other judges when determining if the privilege applies. The applicability of the privilege is a matter of law and this Court will not explore matters of fact in making that determination. *See Sargent,* 916 F. 2d at 1130.

After examining the communications, the Court finds they were made "during the course and as a part of a judicial proceeding." A probation officer's work is to insure

that a court's orders of probation are carried out and to report to the court if they are not. This is a valuable part of a judicial proceeding. The Court also finds that the content of the statements had "some relation to a proceeding that [w]as contemplated in good faith and under serious consideration." Defendant disclosed serious information to the circuit court judges in good faith. Specifically, Defendant reported to the court various concerns that there may be some impropriety involved with court ordered urinalysis tests. This information was directly related to a judicial proceeding because if there were ethical problems involved with the drug testing/screening services, many criminal cases would be affected. Therefore, as a matter of law, the Court finds that the Defendant's communications with the circuit court judges were made as a part of a judicial proceeding, were directly related, and were protected by an absolute privilege.[3]

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[3] Since the Court has addressed the Defendant's claim of absolute privilege and found that defense applicable in this case, it is not necessary to address Defendant's claim of qualified privilege. Although the Court is not specifically addressing this claim, it notes that the defense of qualified privilege can only be overcome by a showing that the allegedly defamatory statements were uttered with malice. In Kentucky, malice is defined as "ill will, hatred or wrongful motive." *See Holdaway Drugs, Inc.* v. *Braden*, 582 S. W. 2d 646, 649-50 (Ky. 1979).

In their response, Plaintiffs characterize Defendant as: 1) making "near lunatic accusations;" 2) believing in a "gigantic conspiracy;" 3) having "megolamia paranoia;" and 4) invoking on a "bizarre missal." In reply, Defendant includes: 1) a copy of an indictment charging Plaintiff Sanford with bribery and theft by extortion; and 2) a copy of a sworn "affidavit in support of a search warrant" revealing that Detective Joe Woosley recorded Plaintiff Sanford telling a probationer that "positive results of drug tests would be destroyed."

For propriety's sake, the Court has disregarded all terms regarding the Defendant's mental well being, as well as any references to Plaintiff Sanford's innocence or guilt in his pending criminal case. The Court considered only the factual basis supported by the record. In doing so, the Court did not find evidence of "ill will, hatred or wrongful motive."

As the Court has found that the Defendant is entitled to sovereign immunity and absolute privilege[4], summary judgment is entered in his favor and all of Plaintiffs' claims are dismissed.

An appropriate order accompanies this memorandum opinion.

This the ____ day of December 1998.

Entered: December 22, 1998

/s/ E. Johnstone
Edward H. Johnstone, Senior Judge
United States District Court

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[4] Having found that the Defendant is entitled to both a defense of immunity and privilege, it is not necessary to address the merits of his claims regarding the sufficiency of Plaintiffs' pleading, i.e., that Plaintiffs did not name the Defendant in his individual capacity and did not specify which language was defamatory, nor is it necessary to address the sufficiency of Plaintiffs' prima facie case of libel.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Case No. 3:98CV-50J

RODNEY SANFORD and
ADAPT, INC. - - - - - - - - - *Plaintiffs,*

v.

LEONARD GARDENOUR - - - - - *Defendant.*

ORDER—Entered December 22, 1998

For the reasons stated in the memorandum opinion, and the Court being sufficiently advised in the premises,

IT IS THEREFORE ORDERED:

1). Defendant's Motion for Summary Judgment [Dkt. #20] is granted and Plaintiffs' claims are dismissed.

2). Pursuant to the agreed order entered on July 17, 1998 [Dkt. #31], Defendant shall have fourteen days from the date of entry of this Order in which to respond to Plaintiffs' Motion for Summary Judgment on the Counterclaim, or alternatively, to move to voluntarily dismiss the counterclaim.

This is a final and appealable order and there is no just cause for delay.

This the 18th day of December 1998.

Entered: December 22, 1998

/s/ E. Johnstone
Edward H. Johnstone, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Case No. 98CV-50J

RODNEY SANFORD and
ADAPT, INC. - - - - - - - - - *Plaintiffs,*

v.

LEONARD GARDENOUR - - - - - *Defendant.*

MEMORANDUM OPINION—Entered March 16, 1999

This matter is before the Court on Plaintiffs' Motion to Set Aside or Vacate the Order of December 22, 1998 whereby this Court granted summary judgment to Defendant and dismissed Plaintiffs' claims. [See Dkt. #43]. Plaintiffs file this Motion to Set Aside the Order arguing that the Court's conclusions were "manifestly wrong." [See Dkt. #44]. Defendant responded to this motion, however no reply was filed. After reviewing the motion and being otherwise sufficiently advised, the Court finds that it will not deviate from its previous order. Plaintiffs' motion to vacate, [Dkt. #44] is denied.

Many of the arguments raised in Plaintiffs' motion to set aside are either arguments that have been previously addressed by the Court in its memorandum opinion or are arguments that should have been previously raised during the pendency of the motion for summary judgment. *See Sault Ste. Marie Tribe of Chippewa Indians* v. *Engler,* 146 F. 3d 367, 374 (6th Cir. 1998) (stating "[a] motion under Rule 59(e) is not an opportunity to re-argue a case"); *see also FDJC* v. *World Univ. Inc.,* 978 F. 2d 10, 16 (1st Cir. 1992) (holding ". . . . parties should not use [Rule 59(e) motions] to 'raise arguments which could, and should, have

been made before judgment issued' "). Therefore, the Court will not address these arguments further.

The Court will however, address Plaintiffs' assertion that the Court "violated its own injunction not, '. . . to explore matters of fact in making that determination,' as to the applicability of the absolute privilege by specifically finding that Gardenour, '. . . disclosed serious information to the circuit court judges in good faith.' " [See Dkt. #44, p. 6-7]. And, that such a finding ". . . cannot support the Court's Summary Judgment because Courts are not entitled to act as finders of fact in making such judgments." [See Dkt. #44, p. 7].

The Court is well aware of the standard that must be followed for a summary judgment determination and in making such a determination in this case, the Court did not act as a fact finder. Instead, the Court followed Sixth Circuit precedent which directs a district court to ". . . . evaluate the content of the statement to determine if it 'has some relation to a proceeding that is contemplated in good faith and under serious consideration.' " when determining if the absolute privilege applies. *See General Electric Co.* v. *Sargent & Lundy,* 916 F. 2d 1119, 1127 (6th Cir. 1990). Only in examining the content of the statement as directed by the Sixth Circuit did the Court determine that "the content of the statements had 'some relation to a proceeding that [wa]s contemplated in good faith under serious consideration' . . . [and] [t]herefore, as a matter of law, . . . [the statements] were protected by an absolute privilege." [See Dkt. #42, p. 9].

In addition, Plaintiff calls to the Court's attention the fact that Defendant's Counter-Claim is unresolved. Pursuant to an agreed order entered on July 17, 1998, the parties agreed "to hold in abeyance the Defendant's response to Plaintiffs' Motion for Summary Judgment pending final disposition by the Court of the Defendant's Motion for Summary Judgment." [See Dkt. #31]. The order provided that "[i]f the Court grants Defendant's Motion for Summary Judgment, Defendant shall have 14 days in which to ei-

ther respond to Plaintiffs' Motion for Summary Judgment on the Counter-Claim, or alternatively, to move to voluntarily dismiss the Counter-Claim." [See Dkt. #31, p. 2]. The order granting Defendant's Motion for Summary Judgment was entered on December 22, 1998 and since that time, no response to Plaintiffs' Motion for Summary Judgment on the Counter-Claim has been filed. As Defendant has not filed a response opposing Plaintiffs' Motion for Summary Judgment on the Counter-Claim [Dkt. #23], the motion shall be granted.

An appropriate order accompanies this memorandum opinion.

This the 11th day of March 1999.

Entered: March 16, 1999

/s/ E. Johnstone
Edward H. Johnstone, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Case No. 98CV-50J

RODNEY SANFORD and
ADAPT, INC. - - - - - - - - - - *Plaintiffs,*

v.

LEONARD GARDENOUR - - - - - - *Defendant.*

ORDER—Entered March 16, 1999

For the reasons stated in the memorandum opinion, and the Court being otherwise sufficiently advised,

IT IS ORDERED:

1). Plaintiffs' Motion to Set Aside or Vacate [Dkt. #44] is denied.

2). Plaintiffs' Motion for Summary Judgment on Defendant's Counter-Claim [Dkt. #23] is granted and Defendant's Counter-Claim is dismissed.

3). The language, "This is a final and appealable order" shall be stricken from the Court's previous order entered on December 22, 1998. [See dkt. #43].

4). As judgment has now been entered on all claims, the Clerk is directed to strike this case from the Court's docket.

5). This is a final and appealable order and there is no just cause for day.

This the 11th day of March 1999.

Entered: March 16, 1999

/s/ E. Johnstone
Edward H. Johnstone, Senior Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5504

RODNEY SANFORD Et Al., - *Plaintiffs-Appellants,*

v.

LEONARD O. GARDENOUR, - - *Defendant-Appellee.*

ORDER—Filed August 25, 2000

BEFORE: KENNEDY, SILER, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RODNEY SANFORD and
ADAPT, INC. - - - - - - - - - - *Plaintiffs*

v.

LEONARD O. GARDENOUR - - - - *Defendant*

PLAINTIFF'S MOTION TO REMAND THIS CASE TO JEFFERSON CIRCUIT COURT

Comes now the Plaintiff, by counsel, pursuant to 28 United States Code §1447(c), to move that this Court enter an Order remanding the case to the Jefferson Circuit Court, Division 1, of the Commonwealth of Kentucky. In support of this motion, the Plaintiff offers the following:

MEMORANDUM OF AUTHORITIES

The Plaintiff originally filed this lawsuit in the Jefferson Circuit Court, Division 1, of the Commonwealth of Kentucky. On January 8, 1998, service of process was effected upon the Defendant, Leonard O. Gardenour within the Commonwealth of Kentucky.

The Complaint recited, and the Defendant has admitted (Petition for Removal, #4) that Mr. Gardenour is a citizen of the state of Indiana. The only basis for federal jurisdiction asserted by the Defendant in its Petition for Removal is the provisions of 28 U. S. C. §1332(a) [Petition for Removal, #2]. In turn, the only provision of that statute that is applicable to this case is 28 U. S. C. 1332(a)(1), which provides that the district courts shall have original jurisdiction of all civil actions between, ". . . citizens of different States," where the amount in controversy, ". . . exceeds the sum or value of $75,000, exclusive of interest and costs,"

The Plaintiff's lawsuit, in keeping with Kentucky Rule of Civil Procedure 8.01 relating to actions for unliquidated damages, did not specify any specific amount of damages claimed by the Plaintiff. The Defendant's assertion that, "Based upon the allegations in the Complaint, the amount in controversy exceeds $75,000 in damages, exclusive of interest and costs," represented merely an assumption upon the Defendant's part.

The Plaintiff hereby submits that the amount in controversy in his lawsuit against the Defendant is less than $75,000, exclusive of interests and costs.

This being the case, this Court has no jurisdiction over this case pursuant to 28 U.S.C. §1447(c), which provides that:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

The Plaintiff has prepared and tendered an appropriate remand Order.

Respectfully Submitted,

/s/ Philip C. Kimball
Attorney for Plaintiff
1970 Douglass Boulevard
Louisville, KY 40205
(502) 454-4479

CERTIFICATE OF SERVICE

I hereby certify that I have served true copies of this and the attached papers upon C. Thomas Hectus, Esq., One Oxmoor Place, 101 Bullitt Lane, Suite 202, Louisville, KY 40202, and William Pettus, State Capitol, Frankfort, KY 40601, upon this the 18th day of March, 1998.

/s/ Philip C. Kimball
Attorney for Plaintiff
1970 Douglass Boulevard
Louisville, KY 40205
(502) 454-4479

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RODNEY SANFORD and
ADAPT, INC. - - - - - - - - - - *Plaintiffs*

v.

LEONARD O. GARDENOUR - - - - - *Defendant*

ORDER OF REMAND

Motion having been made, and it appearing to the Court that the amount in controversy relating to the Plaintiff's claim against the Defendant is below the amount necessary to confer jurisdiction over this Court pursuant to 28 U. S. C. §1332(a)(1), it is hereby ORDERED pursuant to 28 U. S. C. §1447(c) that this case be and is hereby REMANDED to the Jefferson Circuit court, Division 1, of the Commonwealth of Kentucky.

This Order is not subject to appeal, 28 U. S. C. §1447(c).

EDWARD JOHNSTONE, JUDGE

DATE ENTERED

February 14, 1997

Honorable Ken G. Corey
Jefferson Circuit Court, Division II
600 W. Jefferson Street
Louisville, Kentucky 40202

Dear Judge Corey:

On February 4, 1997 I prepared the attached report. I requested a waiver of the courts' requirement that my client, Derwin Taylor, be drug-tested at Adapt, Inc. (95CR1880).

The basis of my request was two-fold. First, urinalyses can be done in the probation office at a cost of $18.00. A comparable test at Adapt costs $36.00. Since Mr. Taylor earns $7.00 per hour, and has two young children at home, it makes good economic sense for Mr. Taylor to be drug-tested in the probation office.

The second reason for my request is more painful and controversial. The "serious ethical questions" mentioned in my report revolve around several issues. First, Adapt is managed by Rodney Sanford, a former supervisor in the probation office. Mr. Sanford is a close personal friend and business partner of James Hager and Don Stearns, both of whom are supervisors in the Louisville office. Certain "subtle coercion" has been undertaken to encourage officers to use Adapt. For example, officers who use Adapt are rewarded with glowing performance reports and preferential assignments to include officers whose performance is demonstrably inferior. Officers who are "in the doghouse" because of misconduct or substandard performance can "beat the rap" by sending their claims to Adapt.

On the other hand, officers who do not send clients to Adapt receive inferior performance ratings and are the targets of such unwarranted harassment as full audits, malicious nit-picking, and involuntary reassignments to less desirable assignments. Numerous memoranda from James Hager have left subtle hints that Adapt is to be the preferred urinalysis provider.

Numerous highly credible officers have had encounters with Adapt which have left serious doubts as to its integrity. For example, I had a female client whom I drug-tested in the office. The urine sample was taken and monitored by a female officer. The result was positive. The client claimed to have been tested "eight or nine times" by Adapt previously. On those previous occasions, her urine sample was provided with no monitoring. All Adapt tests were negative.

Another officer drug-tested a client in the probation office and, at the same time, sent the client to Adapt. The officer's test was positive. Adapt's test was negative. Smith-Kline Laboratories offered to test both samples to determine if they came from the same person. The officer agreed, but Rodney Sanford refused to grant permission for such a test.

Another officer received a client who was court ordered to be tested and treated for substance abuse at Adapt. The client paid $500.00 to Adapt. No urinalyses were done, and the "treatment" consisted of nothing more than a referral to Alcoholics Anonymous.

Another officer received a client who was court ordered to be drug-tested at Adapt. However, the Court Order did not include the requirement that the client pay for his tests, so Rodney Sanford refused to do any urinalyses on this client. The officer subsequently performed the tests. Later, Rodney Sanford asked the officer for the urinalysis lab reports so that he (Rodney Sanford) could present those reports to the court as his own. The officer refused. Rodney Sanford has been observed searching this officer's file cabinets in the officer's absence while another officer (a close personal friend) stood lookout.

According to our Code of Ethics, probation and parole officers are to avoid even the appearance of unethical conduct. A Court Order which singles out Adapt as the urinalysis provider forces the officer to submit to conduct which appears to violate the Code of Ethics. I have no doubt the court has been led to believe Adapt is the logical solution

to the burden upon officers to drug-test their clients. However I can assure you that my moral dilemma regarding Adapt is shared by a majority of officers here, but most officers are afraid to speak out.

On February 10, 1997 my supervisor, Debora McGill, blocked the attached report. She stated to me that she would revise the report to exclude any mention of "ethical questions" or "integrity issues" regarding Adapt. She claimed that she would "conduct an investigation" into Adapt regarding any issued relating to ethical questions or integrity. Such issues have been raised with supervisors before, but nothing has been done, except to stifle the questions and punish the questioners.

I believe the Court has been mislead regarding Adapt, Inc. I believe that officers have been improperly influenced by supervisors to use Adapt. I believe supervisors continue to suppress evidence of Adapt's unethical and improper conduct.

I respectfully urge you to reconsider singling out Adapt as the urinalysis provider, in light of the above mentioned issues.

Sincerely,

/s/ Leonard O. Gardenour
Leonard O. Gardenour
Probation and Parole Officer

LOG/bes
Attachment

[PHOTOSTAT]

P:201
5/93

DIVISION OF PROBATION AND PAROLE
SPECIAL SUPERVISION REPORT

SENDING STATE Kentucky
DATE 02 04 97
MO. DAY YR.

LEVEL OF SUPERVISION
( ) Intensive ( ) Maximum
(X) Specialized ( ) Medium

TYPE OF CASE
(X) Probation ( ) Parole
( ) Misdemeanant ( ) Pretrial

Taylor	Derwin	Miles	95CR1880
LAST NAME	FIRST	MIDDLE	INSTITUTION NO. OR PROBATION NO.

331 McCawley Road	Louisville	KY	40219
STREET (OR DETENTION FACILITY)	CITY	STATE	ZIP CODE

Last Home Visit N/A (Date) Last Office Contact 02-04-97 (Date)

TYPE OF REPORT
( ) Release from Supervision ( ) Probation Expired ( ) Death ( ) Final Discharge ( ) Probation Revoked ( ) New Conviction ( ) Rel. Ct. Order ( ) Returned Tech. Viol. ( ) Transferred ( ) Absconder ( ) Pending PR Revocation ( ) OTHER

COURT: Jefferson Circuit Court: Div. 11
Judge: Honorable Ken Corey
Crime: POCS (FIREARM); TIH (FIREARM); PODP; RSP 0/$300.00
Sentence: 9 yrs. 6 mon. w/h 5 years
Date Probated: 06-17-96 Max. Exp.: 06-17-01

PAROLE BOARD:
Crime:
Sentence:
Date Paroled:
Max. Exp.:

SPECIAL ATTENTION SECTION:

I request a waiver of the Court's Order of Shock Probation which requires Mr. Taylor to be drug-tested at Adapt, Inc. Urinalyses can be conducted in the Probation Office at a fraction of Adapt's cost. Mr. Taylor has a wife and two children. He earns $7.00 per hour.

Certain serious ethical questions have arisen regarding Adapt, Inc. In addition, the integrity of Adapt's procedures in collecting urine samples has been seriously compromised in the past. As a sworn peace officer, I am duty-bound to uphold the highest standards of integrity. Therefore, I respectfully request that Mr. Taylor be drug-tested in the Probation Office, at his expense.

I would further request that the three week interval of drug testing be revised to "random testing" since Mr. Taylor is now on minimum supervision

Approved by: _____ Probation and Parole Leonard O Gardenou
date: 02-05-97 s/f Judicial District 30th

Exhibit B

APX -87a-

BEST AVAILABLE COPY

[LETTERHEAD OF COMMONWEALTH OF KENTUCKY, JEFFERSON CIRCUIT COURT]

February 27, 1997

Commissioner Douglas Sapp
Department of Corrections
5th floor State Office Building
501 High Street
Frankfort, Kentucky 40601

Dear Commissioner Sapp,

Probation and Parole Officer Leonard Gardenour yesterday hand-delivered the attached two-page letter and one page supervision report. The allegations contained within both are certainly very troubling to me.

I therefore think it best to send copies of his correspondence to you, all parties mentioned within the correspondence and to Paul Richwalsky, the Special Prosecutions Director of the Attorney General's office.

I often require first time drug offenders to be drug tested on the day scheduled for sentencing. I then reassign the actual sentencing date and either incarcerate or probate the defendant dependent upon the test result. In that the defendants are not-on-probation at the time of the first Lest, I have not been sending them to the Probation and Parole Office. It is my opinion that your officers have a heavy enough case load without acting as an offsite testing center.

Additionally, it was my impression that the drug test by the Office of Probation and Parole was essentially an occasional and random part of supervision. Therefore, I have requested monthly unannounced drug tests of the defendant at Adapt due to their close proximity to the Hall of Justice and rapid response in regard to the test results. Costs of the tests have not been an issue with me, in that I figure $35 is somewhat less expensive then daily crack cocaine.

I am now in a quandary as to future referrals. Any advice you might offer would be appreciated.

Yours truly,

/s/ K. Corey
Ken G. Corey, Judge

md

Enclosures

cc: Leonard O. Gardenour, Office of Probation and Parole
Rodney Sanford, Adapt
James Hager, Office of Probation and Parole
Don Stearns, Office of Probation and Parole
Debora McGill, Office of Probation and Parole
Paul Richwalsky, Assistant Attorney General